IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

In the matter of: C & S INDUSTRIES, INC. (Chapter 11 Case 185-00516) Debtor C & S INDUSTRIES, INC., A Corporation Plaintiff v. NOONAN SOUTH, INC., Successor to Noonan-Kellos, Inc., a Corporation Defendant	Adversary Proceeding Number 186-0028

FILED
at 4 O'clock & 50 min. P M
Date 6/24/87
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia POB

MEMORANDUM AND ORDER

On August 21, 1986, this Court granted a default judgment against the Defendant upon Motion of the Plaintiff pursuant to Bankruptcy Rule 7055. On January 28, 1987, the Defendant filed a Motion asking this Court to set aside the default judgment. For the reasons set forth below, the Defendant's Motion must be denied.

The Plaintiff initiated this adversary proceeding by a complaint filed on March 14, 1986. A copy of the Complaint, together with a Summons and Notice of Trial was served on the Defendant corporation as follows:

c/o Jim Hudson
Project Supervisor
Humana Hospital
3651 Wheeler Rd.
Augusta, Georgia 30907

The Defendant failed to file an answer or other pleading in response to the Summons. The Trial was continued on Motion of the Plaintiff from the original date in the Summons and Notice of Trial. Thereafter, this Court mailed a copy of the Order on Motion for Continuance and a new notice of trial to the Defendant on June 16, 1986. On June 17, 1986, the Court issued a Pre-Trial Order which was also served on the Defendant. The Defendant made no response to any of the notices or this Court's Pre-Trial Order.

On July 18, 1986, the Plaintiff filed its Motion for Default Judgment. After a hearing on August 14, 1986 to determine the adequacy of the Plaintiff's service on the Defendant, this Court entered its Default Judgment.

The Defendant's Motion to set aside the Default Judgment filed January 28, 1987, alleges that service of the original Summons and Notice was legally inadequate and that the Defendant's failure to file an answer was the result of excusable neglect within the meaning of Bankruptcy Rule 9024 [incorporating F.R.C.P. 60(b)]. Neither allegation is supported by the facts.

The Defendant is a general contractor which did work on the Humana Hospital in Augusta, Georgia. The Plaintiff was an electrical sub-contractor on that job. Jim Hudson, an employee of the Defendant, was the project manager of the Humana Hospital job. (Deposition of Hudson, p.1) In that capacity, he was the highest-ranking employee on the job. (Deposition, p.16) He had the authority to hire and fire employees working on the Humana project; he had authority to fire sub-contractors who were doing unsatisfactory work. (Deposition, p.19).

The Plaintiff mailed the Complaint and the Summons and Notice of Trial to Hudson in care of the hospital. A hospital employee signed a return receipt for the Summons and hand-carried it to Hudson who worked on the hospital grounds. (Deposition, p.5) (See also affidavit of Bobby R. McCarter, a hospital employee, in which he admits receipt of the certified letter and "assumes" that he delivered it to Hudson, although he does not specifically recall the incident.) Hudson mailed the

Complaint and Summons and Notice to the Defendant's regional office in Marietta, Georgia, and confirmed receipt of those documents with two persons in the Marietta office, including the corporate secretary of the Defendant. (Deposition, p.5,6) (See also, affidavit of Jeanne B. Dozier.)

A complaint in the Bankruptcy Court may be served on a corporate defendant by first-class mail directed to the attention of "an officer, a managing or general agent, or to any other agent authorized by appointment or law to receive service . . . ". Bankruptcy Rule 7004(b)(3). While the statute does not elaborate on the characteristics of a "managing or general agent", Courts construing the terms under the Bankruptcy Rules and the parallel language of F.R.C.P. 4(d)(3) have concluded that service is adequate if it is made upon,

> " . . . a representative so integrated with the organization that he will know what to do with the papers."

Top Form Mills v. Sociedad Nationale, Inc., 428 F.Supp. 1237 at 1251 (S.D. N.Y., 1977) quoting Montclair Electronics, Inc., v. Electra/Midland Corp., 326 F.Supp 839 at 842 (S.D. N.Y., 1971); see also In re Schack Glass Industries Co., Inc., 20 B.R. 967 (B.C. N.Y., 1982); Nichols v. Surgitool, Inc., 419 F.Supp. 58, 63 (W.D. N.Y., 1976). Jim Hudson was such a person. He was

invested with sufficient authority by the Defendant to make it reasonable for the Plaintiff to expect that service on Hudson would result in a prompt, appropriate response.

Noonan South, Inc., conducts business at many locations. (Deposition, p.14) Because the Plaintiff's complaint related solely to work being done at the Humana Hospital job, service on the corporation's highest ranking employee at the location of that job was particularly appropriate. See N.L.R.B. v. Clark, 468 F.2d 459, 463 (5th Cir., 1972). The fact that a Humana Hospital employee may have signed a receipt for the Summons, etc., before delivering the documents to Mr. Hudson does not invalidate the resulting service. Nichols, supra. at 63.

The federal rules for service of process are intended to provide defendants with actual notice of an impending action. Id. When this Court is required to construe the legal sufficiency of service, it may consider the fact of actual receipt pf notice. Nichols, supra. at 63 citing Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940). After consideration of all the facts before me, I conclude that service upon Noonan South, Inc., was legally valid.

I also conclude that Noonan South, Inc., has not shown excusable neglect for its failure to plead or appear in

this proceeding until five months after the entry of a default judgment. The Defendant alleges that its failure to respond to this Court summons was the result of the fact that it did not receive timely notice of the proceeding. This allegation is not clearly supported by the affidavit of Jeanne B. Dozier which was filed in support of the Motion to Set Aside the Default Judgment wherein she admits knowledge of the lawsuit "sometime in the summer of 1986". This allegation is also clearly contradicted by the deposition testimony of Jim Hudson. See Affidavit of Dozier, ¶7).

While setting aside a judgment based upon a finding of excusable neglect by a trial court is to some degree discretionary, such a finding must be based on an affirmative showing by the movant. Here Movant has failed to negate the evidentiary showing of Plaintiff that proper service was made and has failed to offer any explanation for its failure to answer, failure to retain counsel and failure to seek to open default for a period of several months. Reid v. Liberty Consumer Discount Co., 484 F.Supp. 435 (E.D. Pa., 1980); Nor did Movant establish an agreement by Plaintiff to waive or defer the requirement of filing responsive pleadings. Whittlesey v. Weyerhauser Co., 640 F.2d 739 (5th Cir., 1981).

Pursuant to Bankruptcy Rule 9024 and F.R.C.P.

60, this Court may set-aside a Default Judgment for, inter alia, "mistake, inadvertence, surprise, or excusable neglect". Noonan South, Inc., has failed to carry its burden of showing why this Court's Default Judgment of August 21, 1986, should be set-aside.

IT IS THEREFORE THE ORDER OF THIS COURT that the Motion of Noonan South, Inc., to Vacate and Set Aside Default Judgment is Denied.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 23rd day of June, 1987.

AO 72A
(Rev. 8/82)